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October 14, 2005

Patti Harrington  
State Superintendent of Public Instruction  
Utah State Office of Education  
250 East 500 South  
Salt Lake City UT 84114

RE: Charter School Board Member as an Employee of the Same Charter School

Dear Superintendent Harrington:

You have requested our legal opinion on the issue of whether a member of a charter school governing board can also be employed by the board at the charter school. This letter responds to your request of October 4, 2005.

A threshold question is raised: Is the charter school a public school such that its governing board members are public officers for the purpose of managing employment at the charter school? My answer to the threshold question is that governing board members are in effect public officers because of their duties to manage a public school program with public money for public school students.

Analysis

Charter Schools are designated public schools within the State's Public Education System. U.C.A. § 53A-1a-503.5. Moreover, a charter school must operate in accordance with its publicly approved charter and is subject to Title 53A, the State System of Public Education, and other laws applicable to public schools, except as expressly limited by law. U.C.A. § 53A-1a-511(1). Charter schools are funded primarily by public funds, receive funding on the same basis as a public school district, U.C.A. § 53A-1a-513, and are required to report and be audited on the same basis as public schools. U.C.A. § 53A-1a-507. Other provisions treat charter schools "on the same basis as other public schools". U.C.A. § 53A-1a-506. The general practice of the Utah State Board of Education and the State Charter School Board is to treat the local charter school governing board as a local district public school board to the extent specifically required by law or as may be practicable.

In addition to being generally subject to public school laws, charter schools are expressly subject to certain other State laws: see U.C.A. § 63-56-1, et seq. (Procurement Code); U.C.A. 52-4-1, et seq. (Open Meetings Act); U.C.A. § 63-2-1, et seq. (GRAMA). On the other hand charter schools are expressly exempt from other provisions of the school code and other laws: see U.C.A. § 53A-1a-511(4); U.C.A. § 53A-1a-512(3)(a); U.C.A. § 53A-8-1, et seq. (Orderly Termination Procedures Act); U.C.A. § 53A-10-1, et seq. (Educator Evaluation); and U.C.A. § 52-3-1, et seq. (Prohibiting Employment of Relatives).

The legislature contemplated that the issue of “determining from which laws and rules charter schools should be exempt” would arise and required the State Charter School Board to make recommendations for exceptions to the Utah State Board of Education and then to the Legislature’s Education Interim Committee. U.C.A. § 53A-1a-511(7).

When the threshold question is reviewed in light of the foregoing provisions, together with the current practice of funding charter school boards as local public school boards, and the State Charter School Board’s duty to make recommendations for further exemptions, it is reasonable to conclude that the local charter school boards are in effect managing public charter schools as *de facto*<sup>1</sup> public officers with public funds subject to regular audit and accountability. The result is that even though not selected through the same elective process as district school boards, the local charter school boards are subject to the same school laws, unless otherwise expressly exempted from any particular law as recommended by the State Charter School Board and the State Board of Education, and then determined by the legislature.

In view of the foregoing analysis and conclusion, the question then becomes: As *de facto* public officers, does the law allow a charter school governing board member to also be employed as a teacher or other employee at the same charter school? In other words, where the same individual is both employer and employee, a question of propriety or conflict of interest arises. The question is especially important where public funds and public school students are involved. Three points are offered for consideration:

**First:** A member of a duly elected local public school board is expressly prohibited from employment by the same board. U.C.A. § 20A-14-202(3).

As a matter of public policy under the foregoing analysis, it is reasonable to conclude that the prohibition that applies to public school board members should also apply to charter school board members. Charter school board members make decisions for public school students in

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<sup>1</sup>A *de facto* public officer is one who exercises the duties of an office under color of an appointment or election, but who has failed to qualify for office for any one of various reasons, as by being under the required age, having failed to take the oath, having not furnished a required bond, or having taken office under a statute later declared unconstitutional. (Black’s Law Dictionary, Seventh Edition (1999).) See 67 C.J.S. Officers, Sec. 339-349.

public schools, manage public funds, and are accountable for the proper use of those funds as well as for the successful operation of public school programs. The charter school board's function is identical in all relevant respects to an elected district school board. In effect, the charter school board should be subject to the same public policy and statutory prohibition.

**Second:** Public policy is further served by concluding that the Utah Public Officers and Employees Ethics Act applies to charter school governing boards:

**§ 67-16-4. Improperly disclosing or using private, controlled, or protected information; Using position to secure privileges or exemptions; Accepting employment which would impair independence of judgment or ethical performance; Exceptions.**

- (1) Except as provided in Subsection (3), it is an offense for a public officer, public employee, or legislator, under circumstances not amounting to a violation of Section 63-56-1001 or 76-8-015, to:
  - (a) accept employment or engage in any business or professional activity that he might reasonably expect would require or induce him to improperly disclose controlled information that he has gained by reason of his official position;
  - (b) disclose or improperly use controlled, private, or protected information acquired by reason of his official position or in the course of official duties in order to further substantially the officer's or employee's personal economic interest or to secure special privileges or exemptions for himself or others;
  - (c) use or attempt to use his official position to:
    - (i) further substantially the officer's or employee's personal economic interest; or
    - (ii) secure special privileges or exemptions for himself or others;
  - (d) accept other employment that he might expect would impair his independence of judgment in the performance of his public duties; or
  - (e) accept other employment that he might expect would interfere with the ethical performance of his public duties.
- (2)
  - (a) Subsection (1) does not apply to the provision of education related services to public school students by public education employees acting outside their regular employment.
  - (b) The conduct referred to in Subsection (2)(a) is subject to Section 53A-1-402.5.
- (3) A county legislative body member who does not participate in the process of selecting a mental health or substance abuse service provider does not commit an offense under Subsection (1)(a) or (b) by:
  - (a) serving also as a member of the governing board of the provider of mental health or substance abuse services under contract with the county;

or  
(b) discharging, in good faith, the duties and responsibilities of each position.

U.C.A. § 67-16-4 (Laws of Utah, C.45, Sec.2, May 2, 2005).

Without question, the board of a local charter school has a public duty to properly manage a public charter school, with public funds, with public programs, for public school students, all within the public education system. Thus though charter school boards are not subject to the public elective process, the members are *de facto* public officers. It is clear that the policy of the Ethics Act prevents an officer of the board from setting his own compensation as an employee and other benefits and incidentals of his own employment, or otherwise using his board membership to secure special privileges or compromise his independence of judgment. The mere fact that the charter school board may not be officially elected should not avoid application of the law and policy in the public interest.<sup>2</sup>

**Third:** As a matter of practical application, to allow a board member to be his own employer/employee compromises his situation to the point where the public interest in appropriate and efficient use of public funds is not well served. As an alternative, recusal of the board member from all aspects of managing his own compensation, assignment, and relationship to the school is not satisfactory because it would render the board member completely ineffective as a decision maker. Moreover, if several charter school board members also are school employees, the board itself would be rendered inoperable. Public policy should recognize an incompatibility of office and employment, and require that the board member must choose either the board position or the employment, but not both.

The common law supports the practical application of the law. The prohibition of dual employment or incompatible offices is universally recognized. Antieau, on Local Government Law, Section 47.01, Vol. 3, p. 478 (2005).

**63C Am. Jur. 2d Public Officers and Employees § 62:**

Even in the absence of express constitutional or statutory prohibitions against the holding by one person of more than one office at the same time,

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<sup>2</sup> Local Charter School Board members may be selected by a variety of private methods as approved in the particular charter. Some members may be appointed or some may be elected by parents or constituents of the charter school. Regardless of appointment or election, the private process is not closely comparable to an official election of a local public school board with the requisite oath of office and terms set by law where the members must again stand for election prior to serving another term in office. Here the pivotal point is the duty to the public which the charter school board members assume upon approval of the public charter school.

it is the rule at common law that a public officer cannot simultaneously hold two incompatible offices.

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The doctrine arises out of the public policy that an officeholder's performance not be influenced by divided loyalties.

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Under the doctrine, one individual may not simultaneously hold two public offices where the functions of the two offices concerned are inherently inconsistent, as where there are conflicting interests, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both.

• • •

It has been stated that the common-law doctrine bars an individual from holding two offices when one office is subordinate to the other, as the governmental checks and balances are eliminated because an individual is reviewing his or her own work . . . .

• • •

. . . and that incompatibility of offices or of an office and employment exists when one office is subordinate to the other or subject to audit or review of the second.

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. . . common law incompatibility may be established where a person, in one of his positions, has the authority to act upon the appointment, salary and budget of his superior in the person's second position.

63C Am.Jur. 2d Public Officers and Employees § 62.

Even though the charter school member is not elected to office through the official public election process or does not take an oath of office the charter school board must still apply and be approved by the State Charter School Board. By clear implication of law, the approval of a charter school is effectively an appointment of each of the governing board members to a position of public duty commensurate with the public trust. The governing board members thereby become *de facto* officers subject to the public trust.

**67 C.J.S. Officers and Public Employees § 244:**

Public confidence in the performance of government officials is of paramount importance. A public office is a public trust, and the holder thereof may not use it directly or indirectly for a personal profit, or to further his or her own interest, since it is the policy of law to keep an official so far from temptation as to insure his or her unselfish devotion to the public interest. Officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public.

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As a general rule, the term "conflict of interest" refers to a clash between public interest and the private pecuniary interest of the individual concerned.

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The interest which disqualifies is a personal or private one, not such an interest as the public officer has in common with all other citizens.

67 C.J.S. Officers and Public Employees § 244.

Application of the common law to the instant situation avoids any compromise of independent judgment or even the appearance of a conflict of interest. Thus, even though charter school board members may not be officially elected or sworn, their application for and subsequent approval of the charter school and its governing board is tantamount to an appointment to public office and public duty by the official public entity under authority of law.

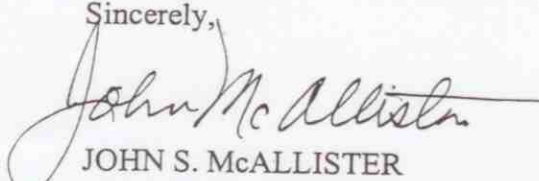
#### In Summary

A member of a charter school board acts as a *de facto* public officer since he receives and controls public funds in a public school in order to accomplish a public education for public school students. Board members have other public educational duties in addition to managing a public school with public funds, and are subject to the public trust in various respects. However, this letter with its analysis and conclusions is limited to the instant request and is not intended to address other possible issues beyond the specific management of charter schools.

As a *de facto* public officer, a local charter school board member is subject to the policy of the election law prohibiting a board member from also being employed at the same school. A board member is also subject to the Ethics Act prohibiting acceptance of any employment which may interfere with his ethical or independent performance of his public duties. And as a practical matter, the policy of the law requires the avoidance of compromising the public interest where a person has public duties or is compensated by public funds.

In conclusion, a local charter school governing board member cannot also be an employee of the same charter school at the same time he or she serves as a board member.

Sincerely,



JOHN S. McALLISTER  
Assistant Attorney General

JSM/da

cc Carol Lear  
John Broberg